

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

INNOVATIVE DISPLAY TECHNOLOGIES LLC, <div style="text-align: center;">Plaintiff,</div> v. ACER INC., ET AL., <div style="text-align: center;">Defendants.</div>	§ § § § § § § § §	Civil Action No. 2:13-CV-00522-JRG <div style="text-align: center;">LEAD CASE¹</div> JURY TRIAL DEMANDED
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**DEFENDANTS’ REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO AMEND
INVALIDITY CONTENTIONS**

Defendants respectfully submit that they have met their burden of showing that good cause exists to amend their P.R. 3-3 Invalidity Contentions to add the four references identified in their Motion For Leave To Amend Invalidity Contentions (“Motion”). (Dkt. No. 63). When considered as a whole, the four relevant factors – the explanation for why the deadline was not met, the importance of the references, potential prejudice to Plaintiff, and the availability of a continuance to cure such prejudice – weigh in favor of allowing amendment.² *See Mondis Tech. Ltd., v. LG Elecs., Inc.*, Nos. 2:07–cv–565–TJW–CE, 2:08–cv–478–TJW, 2011 WL 2149925, at *1 (E.D. Tex. May 5, 2011) (*citing Arbitron, Inc. v. Int’l Demographics, Inc.*, No. 2:06-cv-434, 2009 WL 166555, at *1 (E.D. Tex. Jan. 16, 2009)). Plaintiff’s argument in opposition boils down to little more than the unreasonable view that prior art discovered after service of invalidity contentions should be categorically excluded. That is not the law. Furthermore, the Plaintiff has offered no argument or evidence to show that it would be harmed by the amendment Defendants seek.

¹ The following cases have been consolidated for pre-trial purposes: Case Nos. 2:13-cv-00522-JRG, 2:13-cv-00523-RSP, 2:13-cv-00524-JRG, 2:13-cv-00525-JRG, 2:13-cv-00526-JRG, and 2:13-cv-00783-JRG

² To be clear, Defendants contend that no alteration of the schedule is necessary.

I. Defendants Were Diligent In Preparing Invalidity Contentions And In Seeking Amendment

As set forth in their motion, Defendants expended substantial time and resources searching for prior art and preparing the Invalidity Contentions, but, even after exercising due diligence, were unable to identify the four prior art references at issue until after serving their contentions. *See* Motion at 4-5. P.R. 3-6 envisions amendment in cases such as this, where a defendant acts promptly upon learning of the new references and satisfies the other three factors. Plaintiff's argument that Defendants offered no explanation, Opposition at 3 (Dkt. No. 65), distorts the facts.

Only one week passed between the time the two new foreign-language references were identified and the time this motion was filed, during which time Defendants translated, analyzed, and charted these references. *See* Motion at 3. As to the two U.S. references, only one month elapsed between discovery of the references and when Defendants first contacted Plaintiff. *Id.* That was a reasonable period of time for six Defendants in these consolidated cases (for pretrial) to analyze these references in relation to the seven patents-in-suit and to coordinate regarding their outreach to Plaintiff.

Plaintiff's reliance on *Computer Acceleration Corp. v. Microsoft Corp.*, 481 F. Supp. 2d 620 (E.D. Tex. 2007) in order to support its argument that Defendants' conduct precludes amendment is misplaced. First, the Court in *Computer Acceleration* granted defendant Microsoft's motion for leave to amend its invalidity contentions. *Id.* at 627. Furthermore, in *Computer Acceleration*, the art that Microsoft sought leave to add was Microsoft's own patent. *Id.* at 625. Here, the prior art at issue are not patents owned or assigned to any of the Defendants. Thus, *Computer Acceleration* provides no support to Plaintiff. Simply citing dicta

out of context does not change fact that the Defendants' here, like Microsoft in *Computer Acceleration*, have shown good cause for the amendment.

Furthermore, Plaintiff suggests that only art that comes by way of "happenstance" should be allowed in amendments and that "publicly available" patents do not meet the requirements for amendment. See Opposition at 5. *GeoTag, Inc. v. Frontier Commc'ns Corp., et al.*, No 2:10-cv-265, 2013 WL 2637141 (E.D. Tex. Jun. 11, 2013), cited by Plaintiff, involved substantially different facts from those here, and does not establish a blanket rule limiting amendment except in circumstances that would hardly, if ever, arise. The reference at issue in *GeoTag*, an AOL guide, was in the physical possession of one of the defendant's counsel, specifically, in his garage. *Id.* at *1. Unlike the present situation, the AOL guide at issue in *GeoTag* was a guide for "what might well be described as the largest and most popular internet systems," *id.* at *1, a reference that should have been readily known to defendants with little or no investigation. According to Plaintiff's reasoning, defendants would virtually never be allowed to amend Invalidity Contentions. This is not the result envisioned by local rules, and is contrary to the four-factor test applied in this district.

II. Plaintiff's Argument That The New Prior Art References Are "Cumulative" Is Baseless

Defendants have offered their proposed claim charts for the four references in good faith in order to plainly show that they are not merely "cumulative" as Plaintiff would suggest. Instead of analyzing these claim charts and explaining to Defendants and this Court why these references are "cumulative," Plaintiff merely asserts that Defendants have not done enough to show why the references contain unique and stronger grounds for invalidity. The proposed claim charts belie that assertion. By its nature, Plaintiff's very opposition to this Motion signals that Plaintiff, in fact, does not regard the references as cumulative.

Moreover, Plaintiff's reliance on *MacroSolve, Inc. v. Antenna Software, Inc.*, Nos. 6:11-cv-287-MHS-JDL, 6:12-cv-74-MHS-JDL, 2013 WL 3833079 (E.D. Tex. Jul. 23, 2013), is misplaced. The *MacroSolve* defendants sought to add seven references to an enormous existing pool of 250 references, in a case involving only one asserted patent. In this seven patent case, Defendants originally narrowed down the number of prior art references to only 47. Now, again, Defendants have culled down a much larger set of prior art references to just the four that are subject to their Motion and have prepared particularized claim charts to only select patents-in-suit, rather than blindly charting every prior art reference that has ever been identified against every asserted claim in each of the seven patents.

III. Plaintiff Cannot Credibly Argue It Would Be Prejudiced By The Inclusion Of The Four References At This Early Stage Of The Case

Allowing amendment of Defendants' invalidity contentions would not prejudice the Plaintiff. Over four months remain in discovery. No depositions have occurred, and neither party has served an expert report. In addition, the sole named inventor on the patents-in-suit (who is represented by Plaintiff's counsel) has not yet produced even a single document. This case is early enough that the addition of the four references would not prejudice Plaintiff.

Nor would Plaintiff's efforts with respect to claim construction be rendered moot. The parties have not exchanged claim construction briefs.³ Even if the parties were further along in claim construction, Plaintiff misstates the role and purpose of claim construction. "[T]he role of 'claim construction' is to describe the claim scope as it was intended when examined and obtained by the applicant, not as it might have been limited upon a different record of prosecution and prior art." *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1384 (Fed.

³ Plaintiff's opening claim construction brief is to be served on June 16, three days after this reply brief is due, but nearly a month after Defendants' opening motion.

Cir. 2001). Indeed, claim construction is a matter of law. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), *aff'g* 52 F.3d 967 (1995) (en banc). Plaintiff's suggestion that its claim construction efforts are so dependent on Defendants' Invalidity Contentions defies common sense. Nothing in Defendants' prior art should impact Plaintiff's position on how claim terms should be construed. Moreover, Plaintiff's argument is purely hypothetical – it has not identified or argued that even one additional claim term would need to be construed if Defendants are permitted to make the limited amendment to their invalidity contentions that they now seek.

Plaintiff's argument that the addition of four prior art references to the case would somehow “nullify IDT's prior efforts and require IDT to develop its case anew,” Opposition at 7, is baseless exaggeration. Plaintiff should have developed its case before filing complaints, not in response to receiving invalidity contentions. Again, this argument suggests that amendments should always be denied, regardless of the stage in the litigation or the scope of the amendments. It also misapplies P.R. 3-6 and the four factor test which courts have applied in granting amendments in situations no more favorable to Defendants than this. *See* Motion at 3-4.

IV. A Continuance Would Not Be Necessary But Would Be Available

Plaintiff raises a red herring argument that a continuance due to the upcoming claim construction deadlines would not alleviate the prejudice to Plaintiff. *See* Opposition at 9. As stated above, an amendment of Defendants' Invalidity Contentions would not, and should not, affect claim construction. Nevertheless, Defendants would not oppose a continuance of claim construction and other deadlines, if the Court were to conclude that a continuance would be appropriate.

V. Conclusion

For the reasons set forth in their Motion, as further explained above, Defendants respectfully ask the Court to conclude that good cause exists to amend their P.R. 3-3 Invalidity Contentions to add the four references identified in the Motion.

Dated: June 13, 2014

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CERTIFICATE OF SERVICE

This is to certify that on June 13, 2014, all counsel of record were served with the foregoing document *via* electronic mail.

/s/ Brian Craft
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